UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 85

Docket No. DC-1221-12-0693-W-1

Nancy Lynn Schoenig,

Appellant,

v.

Department of Justice,

Agency.

October 30, 2013

Nancy Lynn Schoenig, Alexandria, Virginia, pro se.

Charles F. Smith, Esquire, and Rena Scheinkman, Falls Church, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her individual right of action (IRA) appeal for lack of jurisdiction for failure to show that she provided the Office of Special Counsel (OSC) a sufficient basis to pursue an investigation which might lead to corrective action. For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision, and REMAND the appeal for adjudication on the merits.

BACKGROUND

¶2 The agency appointed the appellant to the position of Emergency Preparedness Program Specialist, GS-0301-14, effective November 8, 2009, subject to a 1-year probationary period. Initial Appeal File (IAF), Tab 7 at 30. In late 2009 and throughout 2010 prior to her termination, the appellant disclosed various fire code and workplace safety violations in the building to her supervisors, Mark Strickland and James McDaniel. IAF, Tab 1 at 12. The appellant alleged that she was informed by both supervisors to not bring these issues up for discussion again and that McDaniel informed her that as a probationary employee she could be terminated for any reason. *Id.* On October 20, 2010, the agency notified the appellant that it was terminating her employment on November 3, 2010, based on unacceptable conduct and performance. *Id.* at 16-17.

¶3 On November 10, 2010, the appellant filed a whistleblower reprisal complaint with OSC regarding her termination. IAF, Tab 1 at 10. On May 31, 2012, OSC informed her that it was terminating its inquiry into her complaint and advised her of her Board appeal rights. IAF, Tab 9 at 4. The appellant filed a timely appeal with the Board. IAF, Tab 1. The administrative judge dismissed the appeal for lack of jurisdiction based on the appellant's failure to submit evidence that she gave OSC a sufficient basis to pursue an investigation which might lead to corrective action. IAF, Tab 12, Initial Decision (ID) at 5.

¶4 The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

¶5 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her remedies before OSC and makes nonfrivolous allegations that: (1) she engaged in whistleblowing activity by making a protected disclosure under

5 U.S.C. § 2302(b)(8); and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a)(2)(A). *Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 6 (2012).

The appellant properly exhausted her remedies before OSC.

¶6 The administrative judge found the appellant failed to prove that she informed OSC of the precise grounds for her whistleblowing charge. ID at 3. The administrative judge noted that the appellant provided only the OSC letter terminating its investigation into her complaint and no other response to his jurisdiction order. *Id.* The administrative judge issued his order to submit evidence to prove jurisdiction on August 1, 2012, and gave the appellant 7 days to respond. IAF, Tab 4 at 5-6. The appellant submitted documentation on August 14, 15, and 20, but the administrative judge rejected those submissions as untimely with no good cause for the untimely filing. IAF, Tab 11.

¶7 The appellant has provided with her petition for review a copy of her original OSC filing and a summary of her disclosures.[1] *Id.* at 14-18, 36-42. This evidence establishes that the appellant did exhaust her remedies before OSC. *Id.* at 36-42. The Board may consider evidence submitted for the first time on petition for review if it implicates the Board's jurisdiction and warrants an outcome different from that in the initial decision. *See Atkinson v. Department of State*, 107 M.S.P.R. 136, ¶ 12 (2007) (citing *Trabue v. U.S. Postal Service*, 102

[1] The appellant states in her petition for review that she attempted to contact the administrative judge and the Washington Regional Office (WRO) six times between August 7 and August 14, 2012, but she was unable to speak with anyone until August 14, 2012, after the deadline to file her jurisdictional response. PFR File, Tab 1 at 3, 6. She also states that she was informed by a WRO staff member that she did not need to submit her OSC packet at that time but would have the opportunity to do so later. *Id.* at 3. Because we find that the appellant was diligent in her attempts to submit her evidence of exhaustion, we have considered the evidence to the extent it affects our jurisdictional determination. *See, e.g.*, *Cassidy v. Department of Justice*, 118 M.S.P.R. 74, ¶ 13 n.4 (2012).

M.S.P.R. 14, ¶ 6 (2006)). The appellant's evidence establishing exhaustion before OSC would only warrant an outcome different from that in the initial decision if the appellant met the other requirements for Board jurisdiction over an IRA appeal. *Id.* As set forth below, we find that the appellant has made the requisite nonfrivolous allegations to establish Board jurisdiction over her IRA appeal.

The appellant made a nonfrivolous allegation that she made a protected disclosure.

¶8 For the Board to have jurisdiction over her IRA appeal, the appellant must make a nonfrivolous allegation that she made a protected disclosure under 5 U.S.C. § 2302(b)(8). *Dorney*, 117 M.S.P.R. 480, ¶ 6. A protected disclosure is a disclosure of information that she reasonably believes evidences a violation of any law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); *Shibuya v. Department of Agriculture*, 119 M.S.P.R. 537, ¶ 20 (2013). At the jurisdictional stage, the appellant is only burdened with making a nonfrivolous allegation that she reasonably believed that her disclosure evidenced a violation of one of the circumstances described in 5 U.S.C. § 2302(b)(8). *Cassidy*, 118 M.S.P.R. 74, ¶ 7. The proper test for determining whether an employee had a reasonable belief that her disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8). *Cassidy*, 118 M.S.P.R. 74, ¶ 7.

¶9 The appellant alleged that she disclosed unresolved life safety violations that were in violation of local fire code and Occupational Safety & Health Administration (OSHA) regulations. IAF, Tab 1 at 11. The appellant alleged that she made the following disclosures: (1) improper evacuation signage; (2) an exit

door not within fire code and OSHA guidelines; (3) sprinklers in the building that were potentially subject to recall; and (4) exit access blocked due to agency employees' not having the required swipe card. *Id.* The appellant cited a series of OSHA regulations that she alleged were violated, including 29 C.F.R. part 1910, subpart E, which contains the OSHA regulations for exit routes, emergency planning, and fire prevention plans. IAF, Tab 1 at 11. We find that a reasonable person would have believed that disclosures (1), (2), and (4) disclosed violations of federal regulations regarding maintaining a safe workplace. However, we find that disclosure (3) does not meet the reasonable person standard. The appellant merely indicated that the sprinklers in question were similar to those subject to recall. Therefore, a reasonable person would not believe that the appellant's disclosure regarding the sprinklers disclosed a violation of an applicable law, rule, or regulation. IAF, Tab 1 at 11.

¶10 The appellant argues that she disclosed a substantial and specific danger to public health or safety. IAF, Tab 1 at 11. Disclosures regarding danger to the public must be both substantial and specific to be protected. *Miller v. Department of Homeland Security*, 111 M.S.P.R. 312, ¶ 6 (2009). Factors to be considered in determining whether a disclosed danger is sufficiently substantial and specific to be protected include the likelihood of harm, when the alleged harm may occur, and the potential consequences of the harm. *Id.* Disclosure of an imminent event is protected, but disclosure of a speculative danger is not. *Id.* The appellant's disclosure regarding the sprinklers merely raised the possibility that the building's sprinklers were the same model subject to recall. *See* PFR File, Tab 1 at 101, 108. We therefore find that the danger the appellant disclosed was speculative and not sufficiently substantial and specific to be protected. We also find that the appellant failed to nonfrivolously allege that her disclosure regarding the sprinklers disclosed gross mismanagement, an abuse of authority, or a gross waste of funds. Accordingly, we find that the appellant failed to

nonfrivolously allege that her disclosure regarding the sprinklers constituted a protected disclosure.

The appellant's disclosures may be protected even if they were made in the normal course of her duties.

¶11 The appellant was employed as an Emergency Preparedness Program Specialist. IAF, Tab 7 at 30. As noted in her annual performance review, she was responsible for overseeing the emergency preparedness program and keeping the Security Chief aware of any problems with the program. *Id.* at 21-29. It therefore appears that the appellant may have made her disclosures regarding potential fire code and workplace safety rule violations as part of her normal duties through normal channels. Under the law in effect at the time the appellant made her disclosures, such disclosures would not have been protected. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-54 (Fed. Cir. 2001); *Stolarczyk v. Department of Homeland Security*, 119 M.S.P.R. 343, ¶ 16 (2012).

¶12 However, the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465, which became effective while the appellant's petition for review was pending before the Board, provides in relevant part:

> If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from [5 U.S.C. § 2302(b)(8)] if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

WPEA § 101, 126 Stat. at 1466. Thus, under the WPEA, the fact that the appellant's disclosures may have been made during the normal course of her duties would not prevent those disclosures from being protected. The Board recently held in *Day v. Department of Homeland Security* that the WPEA clarified the ambiguous definition of "disclosure" under the WPA and that the

WPEA's "refinement" of that definition therefore applies to pending cases. *Day v. Department of Homeland Security*, 119 M.S.P.R. 589, ¶¶ 10-26 (2013). Accordingly, it is not necessary to determine in this appeal whether the appellant's disclosures would be protected under the pre-WPEA standard.

The appellant made a nonfrivolous allegation that her protected disclosure was a contributing factor in the covered personnel action.

¶13 Once the appellant has made a nonfrivolous allegation that she made a protected disclosure, she must also make a nonfrivolous allegation that the disclosure was a contributing factor in the covered personnel action. *Dorney*, 117 M.S.P.R. 480, ¶ 6. An employee may demonstrate that a disclosure was a contributing factor in the covered personnel actions through circumstantial evidence, such as the acting officials' knowledge of the disclosure and the timing of the personnel action. *Shibuya*, 119 M.S.P.R. 537, ¶ 22. Thus, an appellant's submission of evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, i.e., evidence sufficient to meet the knowledge-timing test, satisfies the contributing factor standard. *Id.*

¶14 The appellant alleges that she made her disclosures to McDaniel most recently on October 15, 2010, and that McDaniel informed her of her termination 5 days later. PFR File, Tab 1 at 40-41. Under these circumstances, we find that the appellant made a nonfrivolous allegation, utilizing the knowledge-timing test, that her protected disclosure was a contributing factor in the personnel action. Therefore, the appellant has met her jurisdictional burden with regard to the contributing factor requirement. *See Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 13 (2006) (a gap of less than 6 months between a disclosure and a personnel action is "sufficiently proximate" to satisfy the timing prong of the knowledge-timing test).

¶15 The appellant has shown that she exhausted her remedy with OSC, and she has made nonfrivolous allegations that she made protected disclosures and that the protected disclosures were a contributing factor in her termination. Therefore, we find that the appellant met the jurisdictional requirements for her IRA appeal and is entitled to a decision on the merits.[2]

ORDER

¶16 We remand this case to the Washington Regional Office for adjudication on the merits of the appeal. Prior to closing the record, the administrative judge shall afford the parties a reasonable opportunity to complete discovery and order the parties to submit any other evidence that the administrative judge deems necessary to adjudicate the merits of the appeal. Consistent with this Opinion and Order, the administrative judge shall issue a new initial decision that makes findings on whether the appellant is entitled to corrective action under the WPA, as amended.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

[2] We note the appellant did not request a hearing when she filed her initial appeal. IAF, Tab 1 at 3.